

OFFICE OF THE PROSECUTOR OF LUCAS COUNTY

OPINION NO. 01-08

Christine Fleitz, Zoning Inspector
Jerusalem Township
9501 Jerusalem Road
Curtice, Ohio 43412

June 20, 2001

SYLLABUS

- I. Construction of an accessory building by a township resident which is placed within the township zoning resolution's required setback area is deemed to be a violation of the township zoning resolution.
- II. The appropriateness of an application for a variance by the landowner in violation of the zoning resolution is subject to the discretion of the township board of zoning appeals.
- III. Measures for handling the violation are provided in the township zoning resolution as well as the Ohio Revised Code.

OPINION

You have requested an official opinion on the following issues:

- I. Whether an accessory building, erected by a township resident on his property, which was placed within an area of a required three foot setback line, is a violation of the Jerusalem Township Zoning Resolution. Specifically, the building is located one foot from the neighbor's property line.
- II. Whether Jerusalem Township's Board of Zoning Appeals may grant a variance to the property's owner.
- III. Whether there are other remedies which may be applicable.

I. **Is there a violation?**

Section 7.2.1 of the Jerusalem Township Zoning Resolution (hereinafter “JTZR”) clearly states:

Accessory building shall have minimum **setback of three (3) feet from all lot lines**, five (5) feet from the main building and be located outside of public rights-of-way or utility easements.
(Emphasis added.)

Thus, a resident desiring to construct an accessory building is obligated to construct the accessory building in accordance with the township zoning requirements. Failure to do so creates a violation of the township’s zoning resolution pursuant to Section 12.8, which provides:

Zoning Permits...issued on the basis of plans and applications approved by the Zoning Inspector **authorize only the use, and arrangement, set forth in such approved plans and applications** or amendments thereto, and no other use, arrangement, or construction. **Use, arrangement or construction contrary to that authorized shall be deemed a violation of this Resolution...**(Emphasis added.)

The owner of the accessory building in this case, in constructing the building over part of the setback line into the reserved area, is in violation of the previously referenced section of the JTZR, and subject to citation.

II. **Is a variance appropriate?**

You have also asked whether the resident who erected the accessory building should apply for a variance. A variance, by the JTZR definition, is:

a modification of the strict terms of the relevant regulations where such modification will not be contrary to the public interest and where owing to conditions peculiar to the property and not the result of the action the applicant, a literal enforcement of the regulation would result in unnecessary or undue hardship.

It is well established in Ohio law, that whether a variance should or should not be authorized in a specific case by a township board of zoning appeals is a matter within the sound discretion of such board.¹ By statute the board is authorized to grant a variance from the terms of the zoning resolution when it will not be “contrary to the public interest,” and “where, owing to

¹See, Mentor Lagoons, Inc. v. Zoning Board (1958), 168 OS 113.

special conditions, a literal enforcement of the resolution will result in unnecessary hardship.” The statute also require “the spirit of the resolution” to be “observed” and “substantial justice done.” Therefore, whether an application for a variance is appropriate in this case is solely within the discretion of the Jerusalem Township Board of Zoning Appeals.

III. Available Remedies

Finally, Ohio Revised Code 519.24 outlines the actions to prevent violations of township zoning resolutions. These provisions are also incorporated into the township’s zoning resolution at Section 12.8.1, entitled “Complaints regarding Violations.” The statute and the zoning resolution allow for the board of township trustees, the township zoning inspector, or any adjacent/ neighboring property owner who is or would be especially “damaged” by the violation to institute an action for an injunction, mandamus, abatement or “any other appropriate action or proceeding to prevent, enjoin, abate or remove such unlawful location...”² A review of JTZR Section 12.8.2 summarizes the punitive provisions for zoning violations, including potential misdemeanor charges, fines and court costs.

However, while a neighboring landowner has *the right* to bring an injunction action when a zoning violation interferes with the use and enjoyment of his property, *equitable considerations may prevent a court from ordering the removal of a structure*. The court does take into account whether the damages occasioned by ordering the building’s removal would by far “exceed” any harm to the neighboring landowner.³

Conclusion

Therefore, it is my opinion and you are so advised:

- I. Construction of an accessory building by a township resident which is placed within the township zoning resolution’s required setback area is deemed to be a violation of the township zoning resolution.
- II. The appropriateness of an application for a variance by the landowner in violation of the zoning resolution is subject to the discretion of the township board of zoning appeals.
- III. Measures for handling the violation are provided in the township zoning resolution as well as the Ohio Revised Code.

Sincerely,

JULIA R. BATES

Prosecuting Attorney

² See R.C. 519.24 and JTZR Section 12.8.1.

³ See Miller v. W. Carrollton (1993) 91 OApp3d 291.

JRB/kdh